

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN DANIEL LEE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45486

FILED

JAN 11 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of home invasion. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Benjamin Daniel Lee to serve a prison term of 16-72 months and ordered him to pay \$300.00 in restitution.

Lee's sole contention on appeal is that the district court abused its discretion at sentencing by not granting him probation. Lee argues that probation would be more appropriate than a term of incarceration because "this Nation now incarcerates many millions of people," and with conditional probation, he would be more likely "to be able to adapt to the community and conform to its rules of behavior." Citing to the dissents in Tanksley v. State¹ and Sims v. State² for support, Lee argues that this court should review the sentence imposed by the district court to determine whether justice was done. We conclude that Lee's contention is without merit.

¹113 Nev. 844, 852, 944 P.2d 240, 245 (1997) (Rose, J., dissenting).

²107 Nev. 438, 441, 814 P.2d 63, 65 (1991) (Rose, J., dissenting).

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.³ This court has consistently afforded the district court wide discretion in its sentencing decision.⁴ The district court's discretion, however, is not limitless.⁵ Nevertheless, we will refrain from interfering with the sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."⁶ Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate to the crime as to shock the conscience.⁷

In the instant case, Lee cannot demonstrate that the district court relied on impalpable or highly suspect evidence, and he has not alleged that the relevant sentencing statute is unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statute.⁸ Further, in exchange for Lee's guilty

³Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

⁴Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

⁵Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

⁶Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

⁷Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

⁸See NRS 205.067(2) (category B felony punishable by a prison term of 1-10 years and a fine of not more than \$10,000.00).

plea, the State agreed to dismiss an unrelated case pending in the Sparks Justice Court and not to pursue additional charges or enhancements related to the instant offense. And finally, we note that the granting of probation is discretionary.⁹ Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing by imposing a term of incarceration.

Accordingly, having considered Lee's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁹See NRS 176A.100(1)(c).